In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-6299

JOHN A. GREELEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that he was deprived of a fair trial because, in taking the stand to rebut the inference of guilty knowledge in regard to his possession of recently stolen property, he opened himself to cross-examination about his prior felony conviction.

After a jury trial in the United States District Court for the District of New Jersey, petitioner and his brother, Ronald Greeley,[1] were convicted of the knowing possession of goods stolen from interstate commerce, in violation of 18 U.S.C. 659. Petitioner was sentenced to eighteen months' imprisonment. The court of appeals affirmed *per curiam* on December 14, 1972 (Pet. App.

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[1] The petition of Ronald Greeley for a writ of certiorari is now pending, No. 72-6057.

A). The petition for a writ of certiorari was not filed until January 18, 1973, and is out of time under Rule 22(2) of the Rules of this Court. There is, in any event, no reason for further review.

On November 3, 1969, a truck loaded with approximately 1400 packages from a large retail store was stolen from a United Parcel Service terminal in Secaucus, New Jersey (Tr. 1.50-1.51, 3.17).[2] The packages were labeled with the names and addresses of the store's customers to whom they were to be delivered (Tr. 3.73). Three days after the theft, petitioner, his co-defendant, and an unidentified youth were discovered removing the packages from the basement of a beauty parlor and loading them into a U-Haul truck rented that day by petitioner. The youth fled when police approached, but petitioner and his brother were apprehended (Tr. 2.2-2.4). Nearly 1200 of the parcels were still wrapped, with the name of the store and the identities of the intended consignees clearly visible (Tr. 3.73).

Petitioner testified that he met a man named "Joe" at a bar. On the day prior to the arrests, "Joe" offered petitioner $200 to move some things from a warehouse in Parsippany to another warehouse in Jersey City. "Joe" gave petitioner $100 plus $50 to rent a truck. The balance was to be paid on delivery. Petitioner enlisted his brother's assistance, rented a U-Haul, and went to the beauty parlor where they were to pick up the load. After loading the truck, petitioner was supposed to call "Joe" at the El Dorado Diner to learn the delivery point, since "Joe" had not de-

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[2] "Tr." refers to the trial transcript. We are lodging a copy with the Clerk of this Court.

cided where to put the goods. Petitioner denied having given a conflicting statement to an F.B.I. agent after his arrest, and he claimed that the agent had prevented him from calling "Joe" to verify his story (Tr. 5.2-5.13).

F.B.I. agent Larry Schneider, a prosecution rebuttal witness, testified that he had interviewed petitioner after his arrest. Petitioner told him that he had met a man named "Joe" at a bar whose name he could not recall. "Joe" offered him $50 to move the goods. Petitioner could not or would not describe "Joe" and said that he had no way to contact him (Tr. 5.20-5.21, 5.31).

Petitioner alleges that he was deprived of a fair trial because he was, in effect, forced to testify in order to rebut the inference that he knew the property was stolen, thereby subjecting himself to cross-examination concerning a prior conviction.

Counsel for petitioner stated in opening argument, prior to the presentation of the prosecution's case, that his client would take the stand (Tr. 1.15). At the conclusion of the government's evidence, petitioner's attorney stated again that petitioner would testify, but proposed that the prosecutor be prohibited from inquiring into petitioner's prior criminal record because of the length of time that had elapsed since petitioner's convictions in 1959 and 1960 on charges relating to a robbery committed in 1957 (Tr. 4.8-4.16). The prosecutor pointed out that petitioner had been in jail until as recently as 1965 and stated his intention to cross-examine only with regard to the more recent conviction (Tr. 4.16, 4.21-4.22).

The court denied petitioner's motion to restrict cross-examination and the prosecutor questioned petitioner as follows:

Q. Have you ever been convicted of a crime?

A. Yes, I was convicted of a crime.

Q. Wasn't that crime robbery?

A. Right, robbery in 1957 [Tr. 5.17].

On re-direct, petitioner's counsel elicted further information concerning this conviction (Tr. 5.17-5.19) and again alluded to it several times during the course of his summation (Tr. 5.67, 5.75).

As the record reveals, petitioner intended from the beginning to testify in his own defense, even before he became aware that the court would instruct the jury that guilty knowledge may be inferred from the possession of recently stolen property (Tr. 1.15). Petitioner therefore cannot complain that this instruction "compelled" him to testify to rebut the inference. In any event the Fifth Amendment is not concerned with the kind of "compulsion" generated by the evidence, or the inferences from the evidence that are founded on rational experience such as the inference in question here. *Turner* v. *United States*, 396 U.S. 398, 417-418; *Yee Hem* v. *United States*, 268 U.S. 178, 185.[3]

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[3] The same instruction is at issue in regard to a different offense in *Barnes* v. *United States*, No. 72-5443, argued March 20, 1973. The outcome of that case, however, need not control the disposition of the instant petition, since the factual background is significantly different. Apart from the manifest rationality of the inference where the property possessed is a large number of clearly marked, recently stolen packages, the evidence also shows that one of petitioner's associates fled as

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

APRIL 1973.

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police arrived. In these circumstances, the inference is derived merely from the weight of the evidence in the case.

Moreover, the instruction in the instant case provided (Tr. 6.20):

> Surrounding circumstances that are relevant in determining whether to infer guilty knowledge from the recent possession of goods are (1) the type of stolen merchandise possessed by the defendants; (2) the quantity of stolen merchandise possessed by the defendants; (3) distinctiveness of the packaging of the stolen merchandise possessed by the defendants; (4) the indication of true ownership of the stolen goods possessed by the defendants; and, (5) the place where the stolen merchandise possessed by the defendants was found.

The instruction thus did nothing more than state the obvious: guilty knowledge may be inferred from possession of recently stolen goods when the circumstances surrounding that possession are such that it is reasonable to conclude that the person possessing the goods had such knowledge.